*THE HONOURABLE SRI JUSTICE V.V.S.RAO

+WRIT PETITION No.11097 and 11098 of 2004

%27-07-2005

A.P. Gas Power Corporation Ltd., Hyderabad (in both the writ petitions)

..PETITIONER

Vs.

$ A.P.Electricity Regulatory Commission, Hyderabad and another

(in both the writ petitions)

..RESPONDENTS

! COUNSEL FOR PETITIONER: Mr. C.V.Nagarjuna Reddy

(in both the writ petitions)

^ COUNSEL FOR RESPONDENT No.1 : ---
COUNSEL FOR RESPONDENT No.2 : T.Anantha Babu

<GIST

>HEAD NOTE:

?CASES REFERRED:

1. AIR 2004 SC 3090 = 2003 (4) SCALE 616
2. (2004) 1 SCC 195

-

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NOS.11097 AND 11098 OF 2004

COMMON ORDER:

Both these writ petitions are filed by A.P.Gas Power Corporation Limited (APGPCL), aggrieved by a common order passed by A.P. Electricity Regulatory Commission (APERC), the first respondent herein, in O.P(SR) Nos.19 and 20 of 2004 dated 04.06.2004. This common order shall dispose of both the writ petitions.

O.P(SR) No.19 of 2004 was filed by A.P.Transmission Corporation Limited (A.P.TRANSCO) under Section 86(1)(f) of the Electricity Act, 2003 (the Act, for brevity) seeking orders from APERC to direct APGPCL to allocate surrendered energy to A.P.TRANSCO from latter's 172 MW, Stage II Power Plant on *pro rata* basis from the date of Memorandum of Understanding-II (MoU-II). O.P(SR) No.20 of 2004 was also filed by
A.P.TRANSCO under Section 86(1)(f) of the Act praying APERC to pass orders directing APGPCL that allocation of power from latter's power plants cannot be made to consumers other than HT Industrial Consumers as per provisions of MoU-I and MoU-II.

A.P.TRANSCO in its application being O.P(SR) No.19 of 2004 contended that as per clause 6 of MoU-II, it is entitled for full allocation of unutilized power by

any participating industry and that in spite of repeated demands made by it, APGPCL did not allocate unutilized/surrendered energy by participants to A.P.TRANSCO. In its application, O.P(SR) No.20 of 2004, A.P.TRANSCO pleaded as follows. APGPCL has two Gas Power Plants at Vijjeswaram of capacity 100 MW and 170 MW. The power generated by APGPCL is shared by participating industries in proportion to the equity contributed by them in the power plants. As per MoU-II, a participating industry can transfer their shares to medium and large scale industries having industrial connections with A.P.TRANSCO. But M/s.VBC Ferro Alloys, a participating industry sold 1.0 MW share in Stage II to M/s.Tata Tele Services Limited which comes under commercial category. By reason of this, A.P.TRANSCO will lose revenue equivalent to difference between tariff of HT commercial and industrial consumers and the loss of revenue Rs.0.90 ps per unit. Though A.P.TRANSCO refused to give effect to transfer of shares by M/s.VBC Ferro Alloys to M/s.Tata Tele Services Limited on the ground that the latter is a commercial category consumer, APGPCL continued to allocate power to M/s.Tata Tele Services Limited and therefore a direction was sought to APGPCL not to allocate power to consumers other than HT Industrial consumers as per MoU-I and MoU-II.

APERC thought it necessary to issue notice to A.P.TRANSCO and APGPCL before admitting the two original petitions. Accordingly, notices were issued. In response to notices, APGPCL filed counters in both the original petitions, *inter alia,* making identical averments on the question of jurisdiction. APGPCL contended that the disputes raised by A.P.TRANSCO did not fall within the jurisdiction of APERC as per Section 86(1)(f) or Section 158 of the Act, that the relationship between A.P.TRANSCO and APGPCL in the matter of power allocation, power sharing and power transfer are governed by MoU-I or MoU-II entered among the shareholders and APGPCL and therefore the dispute, if any, does not fall within Section 86(1)(f) of the Act. It was also urged that any dispute in relation to or arising out of MoU-II has to be settled by way of arbitration and that APERC has no jurisdiction to resolve the dispute under 86(1)(f) of the Act. The APERC considered these aspects in the background of the provisions of the Act and came to the conclusion that disputes raised by A.P.TRANSCO are those which arose between the licensee and generating company and therefore APERC has got jurisdiction to adjudicate upon the disputes.

The learned counsel for APGPCL, Sri C.V.Nagarjuna Reddy, submits that APERC has no jurisdiction to entertain and adjudicate the dispute raised by A.P.TRANSCO as no dispute pertaining to functions of A.P.TRANSCO arose. As investment made by it in the captive generating plant or generating company for the purpose of *pro rata* sharing of power is not part of its duties/functions under Section 39(2) of the Act. The relationship between the petitioner and second respondent is that of a company and its shareholder and therefore second respondent cannot assert its position as licensee under the provisions of the Act. All the rights of the second respondent flow from two MoUs and no dispute as such exists between petitioner and second respondent. It is nextly contended that the petitioner is a captive generating plant which is distinct from generating company. Therefore, any dispute between A.P.TRANSCO and petitioner in relation to MoU cannot be a dispute for the purpose

of Section 86(1)(f) of the Act. Thirdly, it is contended that as per Article/clause 7 of MoU-II, all differences or disputes between the parties to MoU shall have to be settled through the arbitration and therefore the jurisdiction of APERC is not attracted. He relied on **A.P.Gas Power Corporation Limited v. A.P.State Regulatory Commission**.

The learned Senior counsel, Sri T.Anantha Babu, appearing for the second respondent submits that A.P.TRANSCO and its direct predecessor are licensees and this statutory status is not inconsistent with its being a shareholder in APGPCL. Such status as a shareholder does not deprive second respondent of its entitlement to invoke the jurisdiction of APERC. Secondly, he would urge that as per 'Memorandum of Association' of the petitioner company, it is a generating company set up with the sole purpose of generating electricity and it is not open to it to describe itself as anything other than generating company. The stand taken by the petitioner that it is a captive generating plant and not a generating company is contradictory to the stand taken by it in the earlier litigation which went up to Supreme Court. The petitioner contended before the Supreme Court that being a generating company, it does not require licence. Therefore, the petitioner cannot now be permitted to raise the plea that it is not a generating company. The dispute raised by A.P.TRANSCO is in relation to its revenue loss incurred as a licensee with regard to the acts of commission and omission of APGPCL and therefore APERC has jurisdiction to entertain the dispute. Learned counsel placed reliance on **APGPCL v APSERC** (supra) and **BSES Limited and TATA Power Company Limited**.

In the background facts and in the light of rival submissions, the only point that would arise for consideration is whether the dispute raised by A.P.TRANSCO before APERC is a dispute within the scope of Section 86(1)(f) of the Electricity Act, 2003?

The Electricity Act, 2003 is an Act to consolidate the laws relating to generation, transmission, distribution, trading, use of electricity and for development of electricity industry promoting competition even while ensuring supply of electricity to all areas duly protecting the interests of the consumer. It also is a law to ensure transparent policies and for providing two-tier redressal mechanism at the Central as well as the State levels. The statement of objects and reasons for the Act would show that radical reforms in generation and transmission of electricity are sought to be ushered in by the new legislation on the principles of de-licensing and open access in transmission. It also provides for; as noticed - State Regulatory Commission, Central Regulatory Commission and an Appellate Tribunal to review the decisions of Regulatory Commissions.

The Act is divided into XVIII parts. Part III deals with generation of electricity, part IV with licensing methods and part V deals with transmission of electricity. The fixation and administration of tariffs is contained in part VII. Part X, which contains Sections 76 to 109 provide for constitution, powers and functions of Central Commission and State Commission. An overview of the Act especially the parts referred to herein would show that the Act brought in structural changes in generation, distribution and transmission of electrical energy. There is a distinct trichotomy among these three

aspects of electricity. The Act also broadly deals with generation separately and transmission separately. As we presently see except in the matter of levying surcharge for cross- subsidy, the Act does not make any distinction between a generating company and captive generating company. Indeed except a couple of provisions in part I (Definitions clause in Section 2 of the Act), part III dealing with generation of electricity and in part V dealing with transmission of electricity, the regulatory mechanism in respect of a generating company and captive generating company are the same. Both the categories are on par in the application of various statutory provisions. To appreciate this, it is necessary to notice a few provisions in the dictionary clause and other related provisions.

The words/terms like 'person', 'electrical plant', 'generate', 'generating company', 'generating station', 'captive generating plant' and 'utility' are defined as under.

> 2(8) **"captive generating plant"** means a power plant set up by any person to generate electricity primarily for this own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association.

> 2(22) **"electrical plant"** means any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity but does not include-

a. an electric line; or

b. a meter used for ascertaining the quantity of electricity supplied to any premises; or

c. an electrical equipment, apparatus or appliance under the control of a consumer;

> 2(28) **"generating company"** means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial judicial person, which owns or operates or maintains a generating station;

> 2(29) **"generate"** means to produce electricity from a generating station for the purpose of giving supply to any premises or enabling a supply to be so given;

> 2(30) **"generating station" or "station"** means any station for generating electricity, including any building and plant with step-up transformer, switch-gear, switch yard, cables or other appurtenant equipment, if any used for that purpose and the site thereof; a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating

reservoirs, dams and other hydraulic works, but does not in any case include any sub-station;

2(49) **"person"** shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person;

2(75) **"utility"** means the electric lines or electrical plant, and includes all lands, buildings, works and materials attached thereto belonging to any person acting as a generating company or licensee under the provisions of this Act;

The term "person" includes a juristic person and also association of body of individuals, whether incorporated or not. The term "power plant" is not defined, though as per 2(50) of the Act ***"power system"*** means and includes *inter alia* generating stations and works relating to generation. Generation means to produce electricity from generating station for the purpose of giving supply to any premises. Generating station is any station for generating electricity including any building and plant with necessary accessory equipment like transformers, switch-gears, sub-stations etc. Keeping this view, we may now consider the definition of captive generating plant.

As seen above, Section 2(8) of the Act, which defines "captive generating plant", contains two parts, namely, main part and inclusive part. Main part is explanatory in nature and defines "captive generating plant" to mean a power plant set up by any person (including juristic person) to generating electricity primarily for his/its own use. The inclusive part expressly includes a power plant set up by (a) any co-operative society; (b) association of persons for generating electricity for use of its members. It is to be noticed that Section 2(8) does not contain exclusionary part. The Parliament was very cautious not to add exclusionary part in the definition of 'captive generating plant'. Presumably for the reason that Section 2(8) of the Act used the words and phrases, which are defined in the dictionary clause. The term 'power plant' or the term 'for generating electricity' have the same meaning as defined in Sections 2(22) and 2(29) respectively. Therefore, any electrical plant set up for generating electricity by a person, an incorporated company, a co-operative society or an association of persons is a generating plant. If such generating plant primarily utilizes the electricity produced in its generating plant for the use of its members or for its own use, the same becomes 'captive generating plant'.

The Government of India in exercise of their powers under Section 176 of the Act, promulgated Rules vide GSR No.379(E), which were published in the Gazette of India extraordinary dated 08.06.2005. These Rules are called Electricity Rules, 2005. As per Rule 3 thereof, no power plant shall qualify as a captive generative plant under Section 9 read with Section 2(8) of the Act, unless 26 per cent of the ownership is held by the captive users and not less than 51 per cent of the

aggregate electricity generated is consumed for captive use. Therefore, to be a captive generating plant, the requirement is that it should be an electricity generating plant or station owned to the extent of 26 per cent by captive users and 51 per cent of the aggregate electricity produced in such generating plant is consumed by such users. Further, insofar as the applicability of the provisions of the Act, the functions and regulatory authorities and the duties and functions of transmission licensees and distribution licensees except to a minor extent are the same for all generating companies whether power plants set up by them are for captive use or not.

The above position becomes further more clear by reference to Section 9 of the Act, which reads as under.

> **9.Captive Generation:-** (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:
>
> Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.
>
> (2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:
>
> Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:
>
> Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

Be it noted that as long as a generating company complies with the technical standards relating to connectivity with a grid, such company does not require licence to operate and maintain a generating station or power plant. Section 9 enables a person or a company to construct, maintain and operate a captive generating plant with dedicated transmission lines but as per the proviso to sub-Section (1) of Section 9 of the Act, the supply of electricity from a captive generating plant through the grid shall be regulated in the same manner as the generating station or a generating company. Section 9(2) confers a right on the person who has constructed captive generating plant, to have open access for the purpose of carrying electricity from his plant to the destination of his use, subject to availability of transmission facility as determined by the State Transmission Utility or Central Transmission Utility. As per second proviso to sub-Section (2) of the Act, any dispute regarding the availability of transmission facility shall have to be adjudicated by State Electricity Regulatory Commission. Thus, as we presently see insofar as establishing an electricity generating plant and the right to open access for the purpose of carrying electricity, or dispute resolution mechanism for the said purpose, there is no distinction between a generating company having generating station and captive generating company or plant set up by a person.

Though a licence is not required for setting up a generating company or captive generating plant, the law requires a licence issued under Section 14 of the Act to transmit electricity or distribute electricity or undertake trading of electricity. The State Transmission Utility shall be deemed to be transmission licensee under the Act as provided under Section 14 of the Act. Even in the method of licensing to transmit, distribute or trading electricity, the law does not distinguish a generating company and captive generating company. Part IV contains Sections 12 to 24 deal with the procedures for grant of licences, amendment/ revocation of licences. In this part, except clarifying the right of a person who has set up a captive generating plant to have open access to transmission system, the procedure for licensing in case of a person with captive generating plant opting for such licence, is the same.

Part V of the Act contains the procedure for Inter-State transmission of electricity, grid standards and also duties and functions of transmission utility. Part VI deals with distribution, duties of distribution licensee and provisions with respect to electricity trader. As noticed, for distribution and trading electricity, a licence is required under Section 14 of the Act. Be that as it is, Section 39 of the Act in Part V and Section 42 in Part VI are relevant to the consideration of question. Section 39(2) of the Act enumerates the functions of State Transmission Utility. As per clause (d) of sub-section (2) of Section 39, it shall be the function of State Transmission Utility to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of transmission charges. It is also competent for the State Utility to fix transmission charges and surcharge thereon as specified by State Electricity Regulatory Commission to be utilized for the purpose of meeting the requirement of cross-subsidy but as per fifth proviso to Section 39(2) of the Act, when State Transmission Utility provides open access to a captive generating plant, surcharge for the purpose of cross-subsidy cannot be levied. Except to the extent of prohibition for collection of surcharge for the purpose of cross-subsidy, Section 39 of the Act treats generating company and captive generating plant equally. So to say, the “generating company” appearing in Section 39(2)(d) also includes a captive generating plant. If such an interpretation is not opted, it would result in absurdity. For instance, in a given case, State Transmission Utility may deny open access to its transmission system to a captive generating plant on the ground that no such obligation is cast on it. In such an event, Section 9 of the Act, which confers a right on a person with captive generating plant to have open access to transmission system would be rendered redundant and meaningless. There is no provision which enumerates two different types of functions of State Transmission Utility, one in respect of generating company and other in respect of captive generating plant.

Section 40 of the Act describes duties of transmission licensees. Here again Section 40(c) of the Act casts a duty on a transmission licensee to provide non-discriminatory open access to its transmission system to a generating company or licensee on payment of transmission charges including surcharge for cross-subsidy. But as per fifth proviso to Section 40 of the Act, a transmission licensee is not empowered to levy surcharge on a person who established a captive generating

plant for carrying electricity to the destination of such person's own use. Even under Section 42 of the Act, which enables a distribution licensee to provide distribution facilities to generating companies by duly collecting charges for wheeling including surcharge, law requires that a captive generating plant cannot be subjected to any surcharge for cross-subsidy.

A reading of Sections 9, 39, 40 and 42 of the Act would lead to the ensuing conclusion. A person or a company is entitled to set up a power plant for his/its exclusive use. The power generated by such captive generating plant set up by a person has to be distributed and transmitted – in a given case; by a distribution licensee or transmission licensee. These licensees are entitled to collect transmission charges or wheeling charges as the case may be including surcharge from generating companies including from persons who set up captive generating plants but surcharge for cross-subsidy is not leviable on captive generating plant. That is the reason why the Parliament thought it fit to define 'generating plant' set up by any person for his own use as captive generating plant separately. Except to the extent of non-levy of surcharge for cross-subsidy, there is no functional dichotomy between generating plant and captive generating plant. This is further made clear by Electricity Rules, 2005. If 26 per cent of the ownership in a plant is held by captive users and 51 per cent of electricity produced is used by them, a generating plant can be treated as a captive generating plant. It only means that the electricity generated over and above 51 per cent has to be necessarily go to the grid, in which event a transmission licensee and distribution licensee come into picture. Even in the case of distribution and transmission of 51 per cent aggregate electricity generated in a captive generating plant, is to be wheeled to the destination of captive use, the same procedures have to be followed. Merely because a captive generating plant at least to the extent of 51 per cent consumes its electricity for captive use, the State Transmission Utility or a transmission licensee or distribution licensee, cannot discriminate while discharging their duties and functions.

In **APGPCL v APSERC** (supra), the Supreme Court considered the question whether it is necessary for APGPCL to have a licence for sale or supply of electricity to participating industries and its sister concerns. Before the Supreme Court, MoU-I among A.P.TRANSCO, APGPCL and six participating industries came to be considered. The Supreme Court considered MoU-I and various provisions of A.P.Electricity Reforms Act, 1998; Electricity Act, 1910; Electricity (Supply) Act, 1948 and Electricity Act, 2003, and laid down APGPCL which set up plant for captive generation of power as a collective venture is not required to have any licence for self-utilisation of the power generated by it, that participating industries are not required to have any licence and that when electricity generated by APGPCL goes to any one or a sister concern of participating industries, it would require licence under Electricity Act, 1910. Here it is apt to extract paragraphs 32 and 47.

> It is pointed out by the learned counsel for the respondents that this definition of captive generating plant which came later on in the provisions of the Electricity Act, 2003, cannot be taken aid of to assign any meaning to the expression "captive consumption" or "group captive consumption generating plant". We, however, find that there is nothing to exclude the natural and

> obvious meaning which flows from the expression itself. Therefore, even before the term "captive generating plant" was defined it would carry the same meaning. That is to say, generation of power for the use of the holder of the plant, may be one single person or a joint venture collectively by many as one unit. We, therefore, hold that the electricity generated by APGPCL and consumed by the participating members setting up the plant under the Memorandum of Association incorporating the company, does not require to have any licence for self-utilisation of the power generated by the company. All that we want to clarify is that it is not in view of equity in favour of the participating industries as held by the Regulatory Commission and the High Court but under the law there is no such requirement for them to have a licence…..
>
> …..As a result of the discussions held above and the findings as recorded by us, the position that emerges is that participating industries and the industries to whom participating industries have transferred their shares, consumption of electricity by them within the limits of the value of their share capital in APGPCL would only amount to captive consumption and for such utilization or consumption of self-generated electricity no licence would be required under any provision of law. So far the sister concern or concerns which have been defined as those under the same group as participating industries, it would require to have a licence if the electricity is made available or provided to them for consumption as, in our view, it shall fall within the ambit of distribution, sale or supply of the electricity and not captive consumption of power. It would be permissible without licence only in case of exemption, if granted in that behalf, by the competent authority.

The above observations of the Supreme Court would show that
i) the term ‘captive generating plant’ carries the same meaning as that of ‘generating plant or generating station’ with a difference that captive generating plant is primarily intended for the use of the holder of the plant, which can be a single person or joint venture collectively; ii) the establishment, production and consumption of electricity by participating members of a captive generating plant does not require any licence under the Act; iii) if a captive generating plant or participating entities utilize the power generated for their sister concerns, a licence would be required as it would fall within the ambit of distribution, sale of transmission of electricity and does not amount to captive consumption. This decision, on which the learned counsel for the petitioners relied, does not support the submission that captive generating plant set up by a person is different from generating plant set up by a generating company. As submitted by the learned Senior Counsel for A.P.TRANSCO, it indeed supports the view that both have the same meaning because unless it is a generating station/electric plant engaged in production of electricity, the same cannot be a captive generating plant when the electricity generated is consumed by the person/persons, who set up such plant. The Act also does not make any distinction with regard to the licensing procedures, tariff fixation (in case of supply of excess generation to State Transmission Utility for the purpose of other consumers) and regulatory measures taken care of by Electricity Act. The attention of this Court is invited to Memorandum of Association of APGPCL, which categorically declares

that the company is being incorporated, *inter alia*, to generate, supply and distribute electricity by setting the power plants anywhere in India using different resources and transmit, distribute and supply power to industries and other consumers of electricity through A.P.TRANSCO. This also belies any contra submission made by the learned counsel for APGPCL.

When the Legislature intended to constitute Electricity Regulatory Commission conferring powers on it in the matter of grant of licences for transmission, distribution and trading of electricity, amendment and revocation of licence, the power to fix transmission charges, wheeling charges and surcharge thereon and enumerated functions to be discharged by the State Commission, did the Legislature intend to exclude captive generating plant from Section 86(1)(f) of the Act? It is submitted by the learned counsel for APGPCL that the jural relationship between A.P.TRANSCO and APGPCL is not statutory but regulated by the contract i.e., MoU-I and MoU-II – and therefore the dispute does not fall within the ambit of Section 86(1)(f) of the Act? This submission needs to be considered in the background of the MoU-II and statutory provisions.

The admitted facts are that A.P.TRANSCO is deemed licensee for transmission, distribution and sale of electricity. It is State Transmission Utility and the transmission system of the State is owned by it and that it is subject to regulation by APERC in all its relations with Independent Power Projects (IPP), generating electricity, independent distribution companies if any, and captive generating plants. It is also not in dispute that A.P.TRANSCO is only organization dedicated to wheeling energy whether such electricity is produced by A.P.GENCO, IPPs or captive generating plants. After implementation of electricity reforms in India and especially in the State of Andhra Pradesh, the relationship of A.P.TRANSCO with generating companies in public sector as well as private sector are not only regulated by agreement between A.P.TRANSCO and other utility but also the provisions of Electricity Act, 2003 and the provisions of A.P.Electricity Reforms Act, 1998, insofar as the same is not inconsistent with Electricity Act. A reference to Sections 49 and 62(1) of the Act make this clear.

After Government of India announced liberalized economic policy in 1991 for attracting investment in power sector, the State Government decided to encourage IPPs. Government of Andhra Pradesh appointed a High Level Committee with Sri Hiten Bhaya as Chairman to provide guidelines on restructuring power sector and a tariff policy. The committee after conducting a detailed study into various aspects submitted its report in April, 1995. The conclusions of the study are found in Chapter X of the report. While recommending restructuring of A.P.State Electricity Board, it was suggested to unbundle the same into A.P.Power Corporation, A.P.Transmission Corporation and Zonal Distribution companies. The functions of these new entities as recommended by Hiten Bhaya Committee are as follows.

Entity Functions

a) A.P.Power Corporation i. Generation of power from all existing generating stations and those under construction by APSEB.

ii. Purchases of power from Central Sector generators and the joint venture generating companies (APGPCL).

iii. Purchases of power from those private generators with which APSEB has already entered into Power Purchase Agreements.

iv. Purchase of power from other States.

v. All major hydro stations that may come up in future.

b) AP Transmission Corporation i. Management of the entire Transmission System – 132 KV and above including interstate lines.

ii. Expansion and upgradation of the existing transmission system.

iii. Load Despatch.

c) Zonal Distribution Companies i. Sale of power to the consumer.

ii. Management of the existing distribution system below 132KV including 132KV substations.

iii. Expansion and upgradation of the existing distribution system.

iv. Extension of supply to new consumers.

Chapter IX of the report of the High Level Committee deals with Regulatory Commission. The recommendations in that regard would show that SERC was conceived as an apex statutory body to deal with power sector in a very comprehensive manner. In this regard, paragraph 4.1.06 from the report of the Committee may be noticed.

4.1.06 Regulation:

Regulation implies adjusting the flow of activities as necessary, as distinct from control which implies the possibility of stopping an activity altogether. For reasons mentioned above, a regulatory body should be set up even before or at least along with the restructuring of SEB. This has been the experience elsewhere in the world also. Our concept of a Regulatory Commission is that it should be able to look after the interests of both the producer and the consumer so that the gains of competition and efficiency can be shared fairly and that the producer fulfils his obligations in regard to the quantity and quality norms laid down. The power industry like others also needs to conform to safety and environmental standards. There are government bodies in existence for the latter functions, therefore, we felt that the proposed Regulatory Commission should mainly concern itself with Tariff and operating performance of the generating and distribution agencies. Since both the public and private agencies will be operating in the field, it is necessary that the Regulatory Commission be totally independent of the Government like a judicial body.

The report of Hiten Bhaya Committee led to Electricity Reforms in State of Andhra Pradesh and passing of A.P.Electricity Reform Act, 1998 whereunder erstwhile State Electricity Board was unbundled into separate companies for transmission and generation of electricity. After going through copy of the report, which is placed before this Court, it is not possible to accept any submission that captive generating plant set up by a person for his own use was intended to be outside the redressal mechanism either under A.P.Act or Central Act, 2003. As noticed already, captive generating plant set up by a person was only given certain concessions by Legislature in the matter of levying surcharge for the purpose of cross-subsidy.

Chapter VII deals with regulation of tariff. This power of fixing of tariff for electricity, its distribution and transmission is exclusively conferred on SERC. The power to specify terms and conditions for determination of tariff are also conferred on SERC. Here again, no distinction is made between a generating company and captive generating company though while determining the tariff, SERC cannot ignore the benefit conferred on captive generating plant in the matter of levying surcharge for cross-subsidy or distribution and transmission of electricity. As per Electricity Rules, it is now permissible for a captive generating plant to supply electricity over and above 51 per cent to other consumers through State Transmission Utility. In such an event, the tariff that a generating plant can levy, can be as determined by SERC in the case of generating companies. Assuming that there is a dispute between a captive generating plant and one of its consumers (not participating industries), such a dispute cannot be resolved except in accordance with Section 86 of the Act.

Learned counsel for APGPCL made an alternative submission that the dispute now raised by A.P.TRANSCO is in relation to the enforcement of the covenants of MoU-II, that it and does not pertain to its distribution or transmission functions, and therefore the dispute goes out of the purview of APERC. The submission again does not commend itself to this Court as it is devoid of merit and ignores the role of A.P.TRANSCO as State Transmission utility.

It is settled that while interpreting a document/contract, intention of parties has to be assessed by referring to attending and surrounding circumstances at or about entering into contract. It is brought to the notice of this Court that MoU-I was entered into on 17.10.1988 between A.P.TRANSCO as first part and six private enterprises/industries for the purpose of formation and registration of a new company, namely, APGPCL. The company was to be floated for the purpose of setting up a natural gas based power generation station at Vijjeswaram in Andhra Pradesh. Apart from dealing with the shareholding pattern of the six participating industries, it was also agreed that A.P.TRANSCO and other industries would share power energy generated by APGPCL in proportion to their share capital, which would be regulated on monthly basis. It was also agreed that APGPCL will go parallel with A.P.System and all participating industries will be common consumers of A.P.TRANSCO and APGPCL. In case of a participating industry, power allocated by APGPCL shall be billed as per the tariff rates of APGPCL and the power in excess of allocation utilized by participating industry shall be billed by

A.P.TRANSCO as per its tariff rates. Clause 10 deals with transmission and it reads as under.

> 10 (a) It is agreed that the power station of APGPCL will work parallel with the A.P.System. A.P.Transco agrees to transmit the power generated by APGPCL to the Participating Industries. For such transmission A.P.Transco agree to receive wheeling charges from APGPCL in kind viz. as a percentage of the energy put into the A.P.System at the Generating Station of APGPCL. Such wheeling charges shall be as follows:
>
> 220KV 10.00%
>
> 132KV 12.50%
>
> 33 KV 20.00%
>
> 11KV 25.00%
>
> EXPLANATION: The model working of wheeling charges is illustrated in Annexure to MOU. The voltage levels referred to above are the voltages at which power is delivered to various Participating Industries and A.P.Transco.
>
> (b) It is agreed that the above rates of wheeling charges shall apply to consumers who are receiving power at the prescribed voltage levels of A.P.Transco. In case the power is availed at lower voltage levels than prescribed thereby resulting in levy of surcharge, the same shall be payable to A.P.Transco on the demand and energy of A.P.Transco.

As per the above clause, whatever power that is generated by APGPCL has to be wheeled and transmitted by A.P.TRANSCO and wheeling charges are levied in kind as a percentage of energy put into A.P.Transmission System controlled by A.P.TRANSCO. In the event of outages, as per clause 13, A.P.TRANSCO has to supplement the power of the participating industries. A reading of other clauses of the agreement would show that A.P.TRANSCO was assigned a major role in the success of APGPCL as a collaborative effort on the part of State Public Utility, participating industries and APGPCL set up by them. It is not only as a participating industry that A.P.TRANSCO is conferred with rights and liabilities, but as a State Transmission Utility an obligation is cast on A.P.TRANSCO in the matter of transmission of energy.

In 1997, probably encouraged by the success of the first gas based power plant, APGPCL proposed to set up second unit with the capacity of 172 MW. Therefore, it accepted additional share capital to the extent of Rs.4,60,96,119/- with face value of each share Rs.10/- from twenty-three industries having HT industrial connections with A.P.TRANSCO. MoU–II is dated 19.04.1997. It may be noticed that by the time MoU-II was entered into by A.P.TRANSCO and APGPCL with other participating industries, the organization(s) gained considerable experience in running the venture. All problems that my crop up, either on day to day basis or periodically and ways to get over the problems were known. That may be one reason why MoU-II is

more elaborate than MoU-I. As we presently see, MoU-II visualizes almost every crisis that might arise in power generation, distribution, transmission, maintenance and the like. MoU-II provides for all these eventualities.

Contract Demand (CD) is equal to entitlement of participating industries in the power generating station and Contracted Maximum Demand (CMD) means the demand contracted by a participating industry with A.P.TRANSCO. 'Scheduled outages' is defined as shutting down for plant maintenance and repairs of the plant with thirty days prior notice, which shall be undertaken by APGPCL in coordination with A.P.TRANSCO during the period of surplus power of the A.P.TRANSCO i.e., from August to November. 'Unscheduled outages' is defined as shutting down the plant for repairs and/or maintenance during the break down of the plant, non-availability of the fuel and forced shut down of the plant, which cannot be predicted in advance. It is also necessary to notice that the power generated by APGPCL is released to the grid through "inter-connection point" which is defined as the point at the outgoing site of 220KV feeder where the power generation station and grid are connected in the APGPCL switch yard. MoU-II contains eight Articles, Article 1 contains definitions and Article 2 contains covenants regarding demand and energy sharing. The aspects like energy generation, distribution and pricing are incorporated in Article 3 whereas Article 4 deals with capital structure of APGPCL. Articles 5 to 8 deal with other maters, which may not be much relevant for the purpose of this judgment.

Article 2 contains the method and manner of sharing energy generated by APGPCL in its unit II. As per Article 2.2, the participating industries may transfer their share of ownership to their sister concerns situated in the State of Andhra Pradesh, who are HT consumers of A.P.TRANSCO. It was also agreed that A.P.TRANSCO shall have the right to sell its share of energy and power to its consumer including the participating industries of APGPCL at the tariff rates of A.P.TRANSCO. Be it noted that as per MoU-II, A.P.TRANSCO is entitled to 42.80 MW of electricity produced by APGPCL in its unit II. It is entitled to sell its share of energy and power to its consumer including participating industries. Not only this whenever a participating industry desires to transfer its share of energy to its sister concern in the State of Andhra Pradesh, the same shall be informed to A.P.TRANSCO. Whenever a participating industry is not able to utilise its share allocated by APGPCL, it is required to give advance notice of at least fifteen days before billing month and such unutilized allocation can be re-allocated to other participants on *pro rata* basis. If a participating industry fails to give fifteen days notice, A.P.TRANSCO has right of getting allocation of unutilized energy of a participating industry. Apart from Articles 2.2 and 2.6, Article 4.5 also confers a right on the A.P.TRANSCO. Under Article 4.5, whenever a participating industry transfers its shares to outsiders with approval of Board of Directors of APGPCL, A.P.TRANSCO is entitled to levy and collect wheeling charges with reference to voltage of supply of transferee, which is certainly different rate of tariff in comparison with the tariff applicable to the participating industry.

Article 2.3 casts an obligation on A.P.TRANSCO. According to this Article, in the event of Scheduled or Unscheduled outages of APGPCL, A.P.TRANSCO has to supplement power, duly collecting the prevailing rates of tariff, and at a rate equal to 133 per cent of prevailing A.P.TRANSCO tariff in the event of unscheduled outages. Under Article 2.5, no participating industry can reduce its CMD without prior approval of A.P.TRANSCO and whenever the participating industry exceed aggregate of eligible demand, it is liable for penal provisions for such excess demand as per terms and conditions of contract and tariff. Excess power availed shall be deemed as drawn from A.P.TRANSCO and billed accordingly.

Article 3.1 contains the covenant regarding energy generation and basis for wheeling charges. The same reads as under.

1. It is agreed by all the parties to this Understanding that the proposed Power Generating Station of APGPCL will operate in parallel with the A.P.Transco Grid. A.P.Transco agrees to transmit the power delivered by APGPCL to the Participating Industries subject to system constraints and exigencies. For such transmission A.P.Transco agrees to receive Wheeling Charges from APGPCL in kind viz. as a percentage of the energy delivered at the Interconnection Point to the A.P.System at the Power Generating Station of APGPCL. Such Wheeling Charges shall be as follows:

220 KV -- 8%

132KV -- 10%

33KV -- 15%

11KV -- 20%

Below 11KV -- 25%

EXPLANATION: The model working of Wheeling Charges is illustrated in Annexure to this Memorandum of Understanding. The Voltage levels referred to above are the voltages at which power is delivered to various PARTICIPATING INDUSTRIES.

APGPCL shall however collect the Wheeling Charges from the PARTICIPANTs excluding A.P.Transco in the form of Sale Revenue as the billing on the Participating Industries shall be done by the APGPCL on the Net Energy Delivered which includes the energy credit given to A.P.Transco.

It is further agreed that Wheeling Charges is not to be levied and collected in respect of A.P.Transco's share of power.

> All the parties to the Understanding agree that the above rates of Wheeling Charges shall apply to consumers who are receiving power at the prescribed voltage levels of A.P.Transco. In case power is availed at voltage levels lower than prescribed, thereby resulting in levy of surcharge, the same shall be payable to A.P.Transco on the demand and energy of A.P.Transco, and as per terms and conditions of supply by A.P.Transco.

A reading of the above clause would show that the power generated by APGPCL is transmitted by A.P.TRANSCO subject to A.P.TRANSCO receiving wheeling charges from APGPCL in kind as a percentage of energy delivered at the interconnection point to A.P.System. Further, APGPCL is entitled to collect wheeling charges from participating industry excluding A.P.TRANSCO in the form of sale revenue but in case of levy of surcharge for receiving at lower voltage levels, the same shall be payable to A.P.TRANSCO on demand energy of A.P.TRANSCO. Article 7 provides for arbitration for resolution of all differences and disputes between the parties arising out of agreement.

An analysis of the relevant Articles in MoU-II would show that in the matter of contributing share capital, in the matter of setting up of generating plant and maintenance of it, in the matter of transmission of energy and in the event of transfer of shares by participating industries, A.P.TRANSCO is given a unique place of primacy. If the generation falls short, it is the duty of the A.P.TRANSCO to supplement shortage of power. APGPCL cannot on its own undertake maintenance of its electrical generation plant without coordination of A.P.TRANSCO. In the event of scheduled or unscheduled outages, it is the A.P.TRANSCO which takes role of saviour. Even in the event of transfer of energy share by a participating industry to its sister concern or in the matter of unutilized share of energy by a participating industry, A.P.TRANSCO is conferred with a right of preemption to get the allocation of the energy. A.P.TRANSCO is even entitled to charge higher rate of tariff as and when it supplies energy over and above CMD. All this would lead that A.P.TRANSCO has rights and liabilities apart from those conferred on it by the Articles of MoU-II. Its status of being transmission licensee and State Transmission Utility without whose presence APGPCL cannot successfully carry on its project remain intact. When A.P.TRANSCO complains that APGPCL failed to discharge its obligations in allocating unutilized energy share of a participating industry and that APGPCL permitted transfer of shares of participating industry to an outsider whose electrical connection falls in a different category, the dispute cannot be said to be only in relation to MoU-II. It is certainly something more that what the agreement stipulates. For instance, though A.P.TRANSCO has a share equivalent of 42.80 MW in the energy generated by APGPCL, in the event of enforcement of Articles 2.2, 2.6 or 4.5 besides other Articles, the share of A.P.TRANSCO would certainly go up and might increase its revenues because under MoU-II, A.P.TRANSCO is entitled to sell its share to its consumers. In the event of APGPCL permitting the transfer of share by a participating industry to an unqualified outsider, the right of the A.P.TRANSCO would be defeated resulting in revenue loss. Therefore, it is not possible to accept the argument that the dispute between A.P.TRANSCO and APGPCL in connection with MoU-II does not fall under Section 86(1)(f) of the Act. A reading of Section 86(1)(f) of the Act would show that all disputes between the licensee and generating

company are to be adjudicated by SERC. The dispute that is brought by A.P.TRANSCO is a dispute between licensee and generating company and therefore SERC has jurisdiction to adjudicate the same.

Before parting with this case, it is necessary to observe that the power is conferred on State Commission to Act as an effective grievance redressal forum in the matter of generation, distribution, transmission of electricity and tariff fixation. These are the matters which brook no delay. Therefore, APSERC instead of determining the issues at preliminary stage and final stage, should always decide all the issues at one time. The procedure of issuing a notice to contending respondents at the time of admission is not contemplated under the Act. Indeed whenever an application is filed APSERC is bound to look into the same and give appropriate disposal. It has no discretion either to admit or reject the case. It can even summarily reject petitions but the method of hearing preliminary objections is not warranted under the Scheme of the Act. If at the stage of determination of preliminary objections, the cases are kept pending in the Courts, the very purpose for which State Commission is constituted would be lost. Under sub-section (3) of Section 86, the State Commission shall have to ensure transparency while exercising its powers, discharging its functions and be guided by National Electricity Policy and National Electricity Plan on tariff policy Regulations made by it under Section 181 of the Act.

The writ petitions are devoid of merit and are accordingly dismissed without any order as to costs.

_____

(V.V.S.RAO,J)

27.07.2005.

pln

Note: LR copy be marked.

(By order)

pln

(One fair copy to the Hon'ble Mr. Justice V.V.S.Rao, for His Lordships kind perusal)

1. The Secretary, A.P.Electricity Regulatory Commission, Hyderabad.
2. The Chairman & Managing Director, Transmission Corporation of A.P.Ltd., vidyut Soudha, Khairatabad, Hyderabad.
3. The Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi.
4. The Secretary, A.P.Advocates' Association Library, High Court Buildings, Hyderabad.
5. 8 LR Copies.
6. 2 CD copies.